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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Curtis L. Day, *Petitioner*

v.

The United States of America, *Respondent.*

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In determining whether an accused has the right to a jury trial, may the court ignore the nature of the charged offense and whether it was triable by jury at common law?

2. Is the maximum authorized period of incarceration the only criterion in determining whether an offense is "serious" and therefore jury triable?

3. Does an offense carrying a maximum prison term of six months or less automatically qualify as a "petty offense" for which there is no right to trial by jury?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Curtis L. Day respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Appendix A) is reported at 682 A.2d 1125 (D.C.App. 1996).

JURISDICTION

The District of Columbia Court of Appeals denied petitioner's petition for rehearing *en banc* on December 11, 1996. The jurisdiction of this Court is invoked under D.C. Code Section 11-102 and 28 U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury...."

Article Three, Section Two of the United States Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury...."

District of Columbia Code Section 16-705(a) provides: "In a criminal case tried in the Superior Court in which, according to the Constitution of the United States, the defendant is entitled to a jury trial, the trial shall be by jury...."

District of Columbia Code Section 16-705(b) provides: "In any case where the defendant is not under the Constitution of the United States entitled to trial by jury, the trial shall be by a single judge without a jury, except that if -

(1) the case involves an offense which is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 180 days (or for more than six months in the case of contempt of court)...."

STATEMENT OF THE CASE

On September 27, 1994, Petitioner Curtis L. Day received a visit from his twenty-three year old daughter. At the conclusion of the visit, Mr. Day approached his daughter and hugged her as she was walking out the door. Mr. Day's daughter, however, claimed that her father fondled her breasts and crotch, and later that night, she called the police to report the incident. Mr. Day was arrested a month later and charged with one count of simple assault.

Before trial, Mr. Day filed a motion asserting his common law right to be tried by a jury. Mr. Day cited the case of *In re Robinson*, 20 D.C. 570, 572 (D.C. 1892), where the court held, "It is beyond the power of Congress to enact a law for

this District or elsewhere to punish an assault and battery without providing a trial by jury."

The trial court denied Mr. Day's jury demand, and without addressing his common law argument, held that Mr. Day had no right to a jury trial because the maximum allowable period of incarceration for simple assault -- 180 days -- did not meet the statutory threshold for jury trials under Section 16-705(b) of the D.C. Code. After hearing the evidence, the trial court summarily convicted Mr. Day of one count of simple assault, sentenced him to four months imprisonment (two months suspended) and placed Mr. Day on one year supervised probation.

On appeal to the District of Columbia Court of Appeals, Mr. Day argued that the Sixth Amendment of the United States Constitution incorporated his common law right to a jury trial and that absent any valid waiver of such right, he could not be tried summarily regardless of the maximum allowable period of incarceration.

Affirming Mr. Day's summary conviction, the Court of Appeals held that "in considering the seriousness of a crime ... the nature of the offense and whether it was triable at common law are no longer to be considered...." *Day v. United States*, 682 A.2d 1125, 1130 (D.C.App. 1996). The only relevant factor, according to the court, was whether the offense was punishable by more than six months incarceration. "[E]ven though assault may have been jury triable at common law, we look to how society currently views the seriousness of the crime." *Id.* at 1129. Since Mr. Day faced only a maximum period of incarceration of 180 days, the court held that he had no right to a jury trial, and his summary trial was proper.

REASONS FOR GRANTING PETITION

This Court should grant Mr. Day's petition for two reasons. First, the Court of Appeals in *Day v. United States* decided an important question of constitutional law which has not been, but should be, settled by this Court. Second, the Court of Appeals decision in *Day v. United States* is in direct conflict with a decision of the United States Court of Appeals for the District of Columbia. *See United States v. Musser*, 883 F.2d 84 (D.C.Cir. 1988).

I. THIS COURT SHOULD CONTINUE TO RECOGNIZE THE COMMON LAW RIGHT TO JURY TRIAL.

The plain language of the Constitution guarantees the right to jury trial in "the trial of all crimes" and in "all criminal prosecutions." U.S. CONST. art. III, sec. 2; U.S. CONST. amend. VI. Over a century ago, however, this Court rejected a literal reading of the constitutional jury trial provisions in a favor of a common law approach. *Callan v. Wilson*, 127 U.S. 540 (1888). Now this Court must decide if the common law approach is still viable, and if not, whether the plain language of the Constitution has any relevance to the right to jury trial.

A. The 'Petty Offense' Doctrine.

It has long been held that the right to trial by jury does not apply to "petty offenses." As this Court held in *Schick v. United States*, 195 U.S. 65, 70 (1904), "it is obvious that the intent [of the framers] was to exclude from the [Sixth Amendment's] constitutional requirement of a jury the trial of petty criminal offenses."

What has never been obvious, however, is how to distinguish "petty offenses" from serious ones. In the earliest cases, this Court did not consider an offense "petty" if it was *malum in se* or was indictable at common law. *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930). For example, this Court categorized as "petty:"

> [v]iolations of municipal by-laws proper, such as fall within the description of municipal police regulations, as for example, those concerning markets, streets, water works, city officers, etc., and which relate to acts and omissions that are not embraced in the general criminal legislation of the state....

Callan v. Wilson, 127 U.S. 540, 553 (1888).

With the proliferation of regulatory and statutory laws that did not exist at common law, however, this Court decided to expand the criteria so that a significant penalty could put an offense beyond the realm of "petty":

> [T]his Court has refused to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common-law crimes, and thus to entitle the accused to the benefit of a jury trial....

District of Columbia v. Clawans, 300 U.S. 617, 625 (1937).

B. *Blanton v. City of North Las Vegas.*

In 1989, this Court attempted to resolve lingering questions regarding the "petty offense" doctrine once and for all in *Blanton v. North Las Vegas*, 489 U.S. 538 (1989). However, *Blanton* has become more significant for it did not do than for what it did.

Finding the traditional common law test to be inadequate for determining whether regulatory and statutory crimes were jury demandable, this Court held in *Blanton* that "[o]ffenses for which the maximum period of incarceration is six months or less ... are presumptively 'petty.'" *Id.* at 543.

The *Blanton* Court was clearly frustrated with the common law test. "Our adherence to a common-law

approach has been undermined by the substantial number of statutory offenses lacking common-law antecedents." *Id.* at 541 n. 5. Nevertheless, this Court did not abandon the common law approach in favor of a strict penalty-driven criterion. "[We have not previously held] that an offense carrying a maximum prison sentence of six months or less automatically qualifies as a 'petty' offense, and decline to do so today...." *Id.* at 543.

While acknowledging that it had "move[d] away from inquiries into such matters as the nature of the offense," this Court did not expressly state that such inquiries were no longer relevant to determining the right to jury trial. *Id.* at 541 n. 5. To the contrary, this Court did not overrule its "early decisions [which] focused on the nature of the offense and whether it was triable by jury at common law." Id. at 541 (citing *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930)).

Moreover, the citation to *Landry v. Hoepfner*, 840 F.2d 1201 (5th Cir. 1988) (*en banc*) and *United States v. Woods*, 450 F.Supp. 1335 (D.C. Md. 1978) suggests that the common law is still relevant, if not determinative, of an accused's right to jury trial.

In *Woods*, the U.S. District Court of Maryland employed a balancing test, whereby the common law pedigree of an offense was one of a number of factors that determined whether the accused was entitled to a jury trial.

> [T]he status of a specific offense at common law is not solely determinative of an accused's right to a jury trial. Rather, the Court must look to the "principle" of the common law to determine if a particular offense is one which would fall into the class of cases properly labeled "petty," or is one which must be regarded as "so serious" that it is "comparable to a common law crime.

450 F.Supp. at 1342. In *Landry v. Hoepfner*, the Fifth Circuit Court of Appeals adopted a less subjective test where the maximum potential penalty had no bearing with regard to offenses that were jury triable at common law.

> We do not suggest that *Callan* or *Colts* have been overruled sub silentio – certainly, that is not for us to say. An offense indictable at common law is not a "petty offense" for purposes of Article III, Section 2, clause 3, or the Sixth Amendment even though it carries no more than a one-month maximum sentence.

840 F.2d at 1209. In sum, it is impossible to square *Blanton's* footnote 5 with the notion that the common law is no longer relevant in determining whether an offense is jury triable.

C. The District of Columbia Court of Appeals Misread *Blanton*.

The District of Columbia Court of Appeals apparently was willing to do what the Fifth Circuit declined to do in *Landry v. Hoepfner* – find that this Court overruled *Callan* and *Colts sub silentio*. In *District of Columbia v. Colts*, this Court held that "[w]hether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense." 282 U.S. at 73. In *Day v. United States*, however, the District of Columbia Court of Appeals held that "in considering the seriousness of a crime ... the nature of the offense and whether it was triable by jury at common law are no longer to be considered in this determination." 682 A.2d at 1130.

The Court of Appeals' *Day* decision appears to conflict with its earlier decision in *Browner v. District of Columbia*, 549 A.2d 1107, 1112 (D.C.App. 1988), where the court held that "offenses which are malum in se, and which were indictable at common law, fall within the constitutional guarantee of trial by jury irrespective of the maximum punishment that can be imposed." More importantly, the *Day* decision is in conflict with this Court's unanimous holding in *Colts*. Certainly the decision to overrule *Colts* was not for the District of Columbia Court of Appeals; if such a determination is to be made, it must be made by this Court.

D. This Court Should not Overrule *Colts* and Allow Legislatures to Define the Constitutional Right to Jury Trial

Overruling *Colts* and the common law test for determining "petty offenses" should give this Court great pause. First, if the Sixth Amendment is held to no longer incorporate the common law right to jury trial, then it would appear that the constitutional guarantees to a jury in "the trial of all crimes" and "in all criminal prosecutions" will have to be read literally. U.S. CONST. art. III, sec. 2; U.S. CONST. amend. VI. *See e.g.*, *Baldwin v. New York*, 399 U.S. 66, 74-75 (1970) (Black, J., concurring in judgment); *Frank v. U.S.*, 395 U.S. 147, 160 (1969) (Black, J., dissenting); *District of Columbia v. Clawans*, 300 U.S. 617, 633-34 (1937) (McReynolds, J., concurring in judgment); *Schick v. U.S.*, 195 U.S. 65, 76-83 (1904) (Harlan, J., dissenting). As this Court recognized in *Callan* summary trials of "petty" offenses cannot be justified without reference to the common law practices existing at the time of the adoption of the Constitution:

> The third article of the constitution provides for a jury in the trial of "all crimes except in cases of impeachment." The word "crime," in its most extended sense, comprehends every violation of public law; in a more limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles, which, at common law, determined whether the accused, in a given class of cases, was entitled to a trial by jury.

Callan v. Wilson, 127 U.S. 540. 549 (1888).

Furthermore, adopting a strict penalty-driven inquiry would eviscerate the constitutional right to jury trial by subjecting it to legislative whim. If the nature of the offense and whether it was jury triable at common law are no longer

relevant, then a legislature could for strategic purposes take universally reprehended crimes, such as rape or child molesting, out of the constitutional guarantees of jury trials by simply reducing the sentences authorized by the offenses. *See United States v. Craner*, 652 F.2d 23, 27 n. 5 (9th Cir. 1981).

Worse, a legislature could rewrite the entire criminal code so as to make every offense triable summarily while maintaining stiff punishment. For example, the offense of first degree murder could be replaced by dozens of creatively structured separate offenses, each carrying a maximum punishment of six months: unlawful lying in wait, unlawful premeditation, possession of an unlicensed instrument used to cause death, possession of an unregistered instrument used to cause death, causing the death of another without a license, causing the death of another without registration, causing injury to the brain of another, causing injury to the kidney of another, causing injury to the heart of another, failure to obtain consent to cause injury to the brain of another, etc.

This hypothetical dissection of a single act into a multitude of criminal offenses, while outrageous at first blush, does not offend Double Jeopardy. *See Blockburger v. United States*, 284 U.S. 299 (1932). In the aggregate, the defendant could face a hundred years or more imprisonment; nevertheless, he would not be entitled to a jury trial since each individual offense is punishable by no more than six months.. *Lewis v. United States*, 116 S.Ct. 2163 (1996).

The possibility of a wholesale recodification of the criminal code in order to abolish jury trials is not as far fetched as it may seem. This Court recognized in *Lewis* that prosecutors are not above "circumventing" the rules in order to deprive criminal defendants of a trial by jury. 116 S.Ct. at 2168. Nor are legislators immune to the lure of summary trials which purport to be more efficient and economical, while increasing the conviction rate.

For instance, by reducing the maximum potential penalty for "serious offenses" such as assault and theft to under six months imprisonment, the District of Columbia City Council purported to abolish jury trials for these offenses while at the same time increasing the actual length of

imprisonment upon conviction. *See* Title I of D.C. Act 10-238, 41 D.C. Reg. 2608 (1994); *see generally, In re. Robinson*, 20 D.C. 570 (D.C. 1892) (assault) and *In re. Faulden*, 20 D.C. 433 (D.C. 1892) (theft). As one council-member explained:

> [T]here was a reluctance on the part of Members to do something that essentially was or seemed to be a lessening of the society's response to a criminal offense....[T]he misdemeanor streamlining didn't let people go any easier, or it didn't lessen the punishment. In fact, it really made the punishment...potentially more severe because, with misdemeanor streamlining, you will serve a maximum of more time than you would under the current system...I think we want to be strict. We just want an efficient system of being strict.

Burgess v. United States, 681 A.2d 1090, 1094 n. 6 (D.C. App. 1996).

In *Day*, the Court of Appeals turned a blind eye to such legislative history, although one judge found it to be "unnverving." *Day*, 682 A.2d at 1130 (Mack, J., concurring). This Court should not ignore such legislative pronouncements as they demonstrate the danger of departing from the common law right to jury trial and the plain language of the Constitution.

II. THE COURT OF APPEALS' *DAY* DECISION IS IN CONFLICT WITH A HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

This Court should also grant Mr. Day's petition because in the District of Columbia there are now two different interpretations of *Blanton* and the Sixth Amendment right to jury trial.

In *United States v. Musser*, 883 F.2d 84 (D.C. Cir. 1988), the United States Court of Appeals for the District of Columbia on rehearing affirmed the appellant's summary conviction for leaving his sign unattended in Lafayette Park in violation of 36 C.F.R. Section 7.96(g)(5)(x). Rejecting appellant's claim that he was entitled to a jury trial, the court relied on the common law distinction between offenses that were *malum in se* and *malum prohibitum*. The court held that the unattended sign regulation was *malum prohibitum* -- wrong only because prohibited -- and did not carry with it any stigma independent of the maximum possible penalty. *Id.* at 84.

However, the court -- having considered the *Blanton* decision -- held that "[c]onviction of an offense that is malum in se may or may not carry a stigma that makes it 'serious' notwithstanding a light maximum penalty ...." *Musser*, 830 F.2d at 84. Therefore, in the United States District Court for the District of Columbia, a defendant may be entitled to a jury trial if his offense carries such stigma so as to make the offense serious. *Accord United States v. Kozel*, 908 F.2d 205 (7th Cir. 1990); *Landry v. Hoefpner*, 840 F.2d 1201 (5th Cir.1988); *Craner v. United States*, 652 F.2d 23 (9th Cir. 1981); *United States v. Floyd*, 477 F.2d 217 (10th Cir. 1973).

For example, if Mr. Musser had used his unattended sign to batter a heckler, he may be entitled to a jury in federal court because he would be stigmatized as "violent" if convicted. Mr. Day, on the other hand, charged with sexually molesting his adult daughter, was tried summarily because according to the District of Columbia Court of Appeals, "the nature of the offense ... [is] no longer to be considered...." *Day*, 682 A.2d at 1130.

Such different interpretations are bound to lead to inconsistency and confusion. Moreover, it gives District of Columbia prosecutors the power to grant or deny the accused a jury trial based on which court -- local or federal – it brings the charges. For these reasons, the Court should grant Mr. Day's petition.

CONCLUSION

At the time Mr. Day demanded a jury trial, he was alleged to have sexually assaulted his twenty-three year old daughter. The charge against him – simple assault – was jury demandable under the common law. In addition to the 180 day term of imprisonment he faced if convicted, Mr. Day could be fined up to $1,000 -- an onerous penalty in light of his indigency. Repeatedly characterizing Mr. Day's offense as "serious" and "vile," the prosecution argued that with regard to his jury demand, Mr. Day's offense was "petty."

The semantic somersaults notwithstanding, Mr. Day was summarily tried and convicted in less than three hours because the court found his offense to be "petty."

The "petty offense" doctrine is not without its faults. It depends on the vagaries of the common law, and thus, may prove meaningless for offenses without common-law pedigrees. But this Court put itself in this position by moving away from a literal reading of the Constitution's jury trial provisions. To move further away from that plain language by denying jury trials for all but those who face more than six months imprisonment is to betray the clear and obvious intent of the framers of the Constitution.

The common law right to a jury trial was incorporated into the Constitution and exists as a fundamental right. *Duncan v. Louisiana*, 391 U.S. 1147 (1968). Any seeming curtailment of right to jury trial should be scrutinized with utmost care. *Dimick v. Schiedt*, 393 U.S. 474, 485-86 (1934). This Court now has the opportunity to put a stop to the District of Columbia's encroachment on that right. For these reasons, Mr. Day respectfully requests that this Court grant his petition for the writ of certiorari.

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APPENDIX A

District of Columbia Court of Appeals

No. 95-CM-675

CURTIS L. DAY, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the
District of Columbia

(Hon. John H. Bayly, Jr., Trial Judge)

(Argued April 15, 1996 Decided September 19, 1996)

Andrew Philip McGuire, appointed by the court, for appellant.

Anna Matheson, Assistant United States Attorney, with whom *Eric H. Holder, Jr.*, United States Attorney, *John R. Fisher* and *Thomas C. Black*, Assistant United States Attorneys, were on the brief, for appellee.

Before STEADMAN and RUIZ, *Associate Judges* and MACK, *Senior Judge*.

Opinion for the court by *Associate Judge* RUIZ.

Concurring opinion by *Senior Judge* MACK at p. 10.

RUIZ, *Associate Judge*: Appellant, Curtis Day, was convicted of simple assault in violation of D.C. Code § 22-504 (1996) in a bench trial before the Judge John H. Bayly, Jr. Day was sentenced to four months confinement, execution of sentence suspended as to all but two months in jail, followed by one year of supervised probation and ten dollars in court costs. Day appeals on grounds that he was denied his constitutional right to be tried by a jury. He argues that since

assault was a crime which was jury-triable under the common law, the Constitution protects his right to a jury in an assault trial. He further argues that for a crime with a common-law antecedent the maximum sentence allowable on a conviction does not determine whether or not a defendant has a right to a jury trial. We disagree with Day and affirm the conviction.

On September 27, 1994, Day received a visit from his twenty-three year old daughter. The two visited for a while in the living room until Day went into his bedroom and called her in. They conversed until Day began to smoke crack cocaine. This upset his daughter so that she left the room. She subsequently attempted to leave the apartment. Day testified that he hugged his daughter and calmed her down before she left; she testified that Day approached her from behind, grabbing her breast. Day's daughter said that her father held the door closed with his foot for about two minutes while he rubbed her breast and her crotch and said "[y]our mind is telling you yes, but your body is saying no." She pushed her father away and left. As she got into her car, Day told her that the next time she came over alone she ought to think about what he was doing. When Day's daughter got home, she discussed the events with her grandmother and called the police.

Day was arrested and charged with simple assault in violation of D.C. Code § 22-504 (1996). Under the Misdemeanor Streamlining section of the Omnibus Criminal Justice Reform Act of 1994,[1] the penalty for a violation of D.C. Code § 22-504, simple assault, was reduced from twelve months incarceration and $500 fine to 180 days incarceration and $1,000 fine.

Before the trial began, the judge heard Day's arguments that he had a right to be tried by a jury. The judge denied Day's motion for a jury trial, and, after a bench trial, found Day guilty of simple assault. Day appeals on the grounds that

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[1] 41 D.C. Reg. 2608, 2610 (1994).

the court's refusal of a jury trial violated his rights under Article III, § 2, and the Sixth Amendment of the United States Constitution.[2]

Day's demand for a jury is reviewed *de novo*. "Determinations of fact-free principles of law are designated questions of law and require an independent appraisal of the record on appeal without deference to the trial court's findings." *Bingham v. Goldberg, Marchesano, Kohlman, Inc.*, 637 A.2d 81, 89 (D.C. 1994); *Davis v. United States*, 564 A.2d 31, 35 (D.C. 1989) (en banc).

Day's argument that he has a constitutional right to a jury trial centers upon whether assault is a "serious" or a "petty" crime. This determination has been made central to a defendant's entitlement to a jury trial because although the literal language of Article III, § 2 of the U.S. Constitution guarantees a right to a trial by jury for "all Crimes, except in Cases of Impeachment," and the Sixth Amendment likewise grants a jury trial "[i]n all criminal prosecutions," the Supreme Court has held that defendants in trials for "petty" crimes can be tried summarily. As the Court pointed out in *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937), "[a]t the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury, by justices of the peace in England, and by police magistrates or corresponding judicial officers in the Colonies, and punished by commitment to jail, a workhouse, or house of correction."

In *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968), the Court said: "we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers

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[2] Article III, § 2 provides: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

of jury trial and prosecuting petty crimes without extending a right to jury trial." In *Frank v. United States*, 395 U.S. 147, 148 (1969), the Court affirmed the notion that there are criminal charges which do not warrant a jury trial. In short, the Court has recognized that while courts must provide for jury trials for all "serious" crimes, "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." *Duncan*, *supra*, 391 U.S. at 159.

The Supreme Court having ruled that the category of petty crimes is outside of the constitutional requirement of a trial by jury, we must determine whether the crime of simple assault is "petty" or "serious" for this constitutional purpose. The Court gave guidance to help with this determination in *Blanton v. North Las Vegas*, 489 U.S. 538 (1989), ruling unanimously that the most relevant criterion for judging "the seriousness with which society regards the offense" is "the severity of the maximum authorized penalty." *Id.* at 541 (quoting *Frank v. United States*, 395 U.S. 147, 148 (1969) and *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (plurality opinion)). The Court looks to "statutory penalties," and primarily "the maximum authorized period of incarceration," because "incarceration is an 'intrinsically different' form of punishment." *Blanton*, *supra*, 489 U.S. at 542 (citing *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975)). The Court established a presumption that crimes punishable by a statutory penalty of six months or less are petty and are not constitutionally required to be tried by a jury. *Id.* at 542-43. The Court in *Blanton* recognized that a legislature might "pack[] an offense it deems 'serious' with onerous penalties that nonetheless 'do not puncture the 6-month incarceration line.'" *Id.*

Day makes two arguments that he has a right to a jury trial. The first argument is that under the common law, assault was triable by a jury, and the Constitution protects that common law right notwithstanding legislation designed to strip the right to a jury trial from the offense of simple assault by reducing the maximum penalty to less than six months

incarceration.[3] The second argument that Day makes is that even if the legislature could affect the right to trial by jury, he is nonetheless entitled to a jury trial because the severity of the maximum authorized penalty is not solely determinative of the seriousness of a crime which was jury triable at common law, but instead, in such cases, the statute must expressly eliminate the common law right to jury trial. Both arguments attempt to persuade this court that *Blanton's* focus on a six-month penalty threshold does not apply in this case.[4] Holding that *Blanton* does indeed apply, we reject both arguments.

Day's first argument is that the *Blanton* ruling does not apply in this case because Article III, § 2 and the Sixth Amendment of the Constitution were not intended to diminish, but rather to protect, the common law right to a jury, and under the common law, assault was jury triable. Therefore, according to Day's argument, the United States Constitution continues to protect Day's right to a jury in a trial for assault. This argument depends upon the assumption that if a crime was jury triable at common law that right may not be modified or extinguished by a legislative act. Day's interpretation of the Constitution, however, has been abandoned by Supreme Court jurisprudence. In its most recent pronouncement on the constitutional right to jury trial, the Court explains its development of the proper analysis to determine whether an offense is "serious" and, therefore, constitutionally entitled to a jury trial:

> To determine whether an offense is properly characterized as "petty," courts at one time looked to the nature of the offense and whether it was triable by a jury at common law. Such determinations be-

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[3] Although Day's counsel did not press this argument orally, we address it because it appears in his brief.

[4] Day has not called to our attention any other statutory penalties that may result from conviction for simple assault.

> came difficult, because many statutory offenses lack common-law antecedents. *Blanton v. North Las Vegas*, 489 U.S. 538, 541, and n.5 (1989). Therefore, most recently, we have instead sought "objective indications of the seriousness with which society regards the offense." *Frank v. United States*, 395 U.S. 147, 148 (1969); accord, *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937). Now, to determine whether an offense is petty, we consider the maximum penalty attached to the offense. This criterion is considered the most relevant with which to assess the character of an offense, because it reveals the legislature's judgment about the offense's severity. "The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task . . . ." *Blanton*, 489 U.S. at 541 (internal quotation marks omitted). In evaluating the seriousness of the offense, we place primary emphasis on the maximum prison term authorized. While penalties such as probation or a fine may infringe on a defendant's freedom, the deprivation of liberty imposed by imprisonment makes that penalty the best indicator of whether the legislature considered an offense to be "petty" or "serious." *Id.*, at 542. An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious. *Id.*, at 543; *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974).

Lewis v. United States, 64 U.S.L.W. 4581, 4582 (U.S. June 24, 1996). Thus, even though assault may have been jury triable at common law, we look to how society currently views the seriousness of the offense.

Day relies on *In re Robinson*, 20 D.C. 570 (1892), to argue that District of Columbia courts, under the common law, found assault to be a serious crime requiring a jury trial. We do not find this argument persuasive because *Robinson* was decided before the passage in 1901 of what is now D.C. Code § 49-301 (1990), which states that the statutes and the common law of Maryland are the law in the District of Columbia "except in so far as the same are inconsistent with, or are replaced by, some provision of the 1901 Code." This provision of the D.C. Code has been interpreted to mean that "[t]he common law, particularly as derived from the common law of Maryland, is the fundamental part of the law in this jurisdiction to which we look *in the absence of statutory enactment.*" *Linkins v. Protestant Episcopal Cathedral Found.*, 87 U.S. App. D.C. 351, 354, 187 F.2d 357, 360 (1950) (footnote omitted) (emphasis added). In *Nelson v. Nelson*, 548 A.2d 109, 116 (D.C. 1988), this court noted that "[i]n order to conclude that the common law duty in question exists in the District of Columbia, it is necessary to ascertain that no applicable statute precludes or abolishes it." In short, D.C. statutory law and D.C. case law agree that a relevant statute supersedes the common law; D.C. Code § 49-301 leaves the common law to fill in where statutes are silent. Day's argument ignores that statutes have explicitly modified or abrogated the common law, and that the common law itself is not frozen in the past but continues to develop. *See, e.g., Linkins, supra*, 87 U.S. App. D.C. at 354, 187 F.2d at 360.

D.C. Code § 16-705 (1989 & 1996 Supp.) spells out which criminal charges carry a right to a trial by a jury and which are triable by a judge sitting without a jury. D.C. Code § 16-705 states in part (a) that if a defendant is entitled to a jury trial under the Constitution, the defendant has that right until the right is waived. Where the Constitution does not mandate a jury trial, part (b) of D.C. Code § 16-705 provides for a jury trial only if "(1) the case involves an offense which is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 180 days . . . ." Otherwise, trials are by a

single judge. *Id.* Whether a crime is jury-demandable in the District of Columbia depends under part (a) upon whether the Constitution requires it or under part (b), upon whether the maximum penalty meets the statutory threshold.

The Supreme Court said in *Blanton*, in determining the constitutional entitlement to trial by jury, "[t]he judiciary should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misrepresentations in this respect.'" *Blanton*, *supra*, 489 U.S. at 541-42 (quoting *Landry v. Hoepfner*, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1083 (1989)). Following its decision in *Baldwin v. New York*, 399 U.S. 66 (1970), the Court in *Blanton* reiterated that it considers any crime that carries a maximum legislatively authorized sentence of over six months to be "serious" enough to require a jury trial. *Blanton*, *supra*, 489 U.S. at 542. The defendant can overcome the presumption of pettiness in cases with a maximum sentence of six months or less only by demonstrating that he is subject to "additional statutory penalties." *Id.* at 543. The Court does not look to common law precedent which has been supplanted by statute, nor does the Court require a search of the legislative history to find the legislature's attitudes; it points only to the penalties that the legislature imposes. *Id.* Applied to the law in the District of Columbia, whether the right to jury trial is asserted under the Constitution or the statute, the relevant inquiry is whether the legislature has determined that the offense is "serious" by imposing a maximum penalty of more than six months or more than 180 days.

Day's alternative argument is that even if new legislation can affect the right to trial by jury for a common law crime, he is nonetheless entitled to a jury trial because the severity of the maximum authorized penalty is not solely determinative of the seriousness of a crime which was jury triable at

common law, but instead, in such cases, the statute must expressly eliminate the common law right to jury trial. Day's argument can be characterized as a rule of construction against deprivation of the right to a jury trial in the case of offenses where that right existed at common law. This argument fails because *Blanton*, *supra*, 489 U.S. at 541-44, ruled that the severity of the maximum authorized penalty is the primary factor to be considered in determining the seriousness of a crime, and the Court has made clear that the nature of the offense and whether it was triable by jury at common law are no longer to be considered in this determination. *See Lewis*, *supra*, 64 U.S.L.W. at 4582. *See also Foote v. United States*, 670 A.2d 366, 371 (D.C. 1996). District of Columbia law is unambiguously clear in setting a maximum of 180 days imprisonment for simple assault.[5] As this court stated in *Stevenson v. District of Columbia*, 562 A.2d 622, 623 n.1 (D.C. 1989) (per curiam), "[I]n light of this plain focus on statutory penalties [in *Blanton*], we decline appellant's invitation to search the . . . legislative history for additional indications that the Council believed [the offense to be] 'serious.'" *Foote*, *supra*, 670 A.2d at 370. That is, we do not look to what legislators say, but to what the legislature has enacted. Thus, neither the Constitution nor District of Columbia law entitle Day to a jury trial for simple assault.

Accordingly, Day's arguments that his constitutional rights have been violated by the trial court's denial of a jury trial are rejected, and the judgment is

Affirmed.

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[5] *Cf. Turner v. Bayly*, 673 A.2d 596 (D.C. 1996) (discussing ambiguities of term "six months").

MACK, *Senior Judge*, concurring: Judges, in this century, have uniformly looked to "Legislative History" to resolve real or imaginary ambiguities in the language or meanings of legislative enactments. It comes as a cultural shock to some of us, therefore, to realize that in some arenas the onerous necessity for research may be obliterated. (See the concerns expressed by [now] Justice Stephen Breyer in *The 1991 Justice Lester W. Roth Lecture — On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).)[1] The news is all the more unnerving when a court finds that it is prohibited from examining the history of a statute that might shed some light on its intended consequences and/or constitutional validity.

The statutory provision under consideration here is a criminal one, limited in language to nothing more than a stark and sterile pronouncement, reducing a term of imprisonment (to a maximum commensurate with a "petty" offense) for a crime (formerly triable by a jury at common law). In the absence of exploration, we have no way of knowing the purpose of the Council in rewriting the pre-existing provision. We have no way of knowing (as other appellants in similar circumstances have argued) whether the Council sought to increase the severity and likelihood of sanctions by forcing defendants to forfeit a trial by jury (*see Burgess v. United States*, No. 95-CM-1352 (D.C. July 22, 1996)), whether it nevertheless considered the crime a "serious" one, or whether it sought to decrease the length of imprisonment to clear prison space for those convicted of more serious crimes.

In any event, I cannot think of a more inappropriate setting in which to begin the curtailing of reliance upon legislative

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[1] *See* W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992); Jack Schwarz & Amanda Stuken Conn, *The Court of Appeals at the Cocktail Party: The Use and Nonuse of Legislative History*, 54 MD. L. REV. 432; Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992).

history. However unnerving this may be, our case law dictates it.[2] *See Stevenson v. United States*, 562 A.2d 622 (D.C. 1989); *Foote v. United States*, 670 A.2d 366 (D.C. 1996); *Burgess v. United States, supra.*

I concur.

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[2] It may or may not be that the legislative body of a cash-strapped municipality is without the prescient advantage that the United States Congress, with its numerous aides, enjoys. Moreover in following the dictates of United States Supreme Court decisions, we are nevertheless without knowledge of congressional assessment of the intent of the D.C. Council.

APPENDIX B

District of Columbia
Court of Appeals

[Filed December 11, 1996]

No. 95-CM-675

CURTIS L. DAY,
Appellant,

M14620-94

v.

UNITED STATES,
Appelle.

BEFORE: Wagner, Chief Judge; Ferren, Terry, Steadman, Schwelb, Farrell, King, Ruiz and Reid, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing en banc; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

ORDERED that the petition for rehearing en banc is denied.

PER CURIAM